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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960
No. 176

LEONARD SALDANA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER.

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SUBJECT INDEX

PAGE

Interest of Amicus Curiae 1

Preliminary statement 2

Argument 3

I.

Petitioner was denied a speedy trial and for reasons which are themselves subversive of the fair administration of justice 3

II.

In the trial before Judge Hall petitioner was subjected to double jeopardy 7

III.

Petitioner was made the victim of capricious action before Judge Hall in an incident that reflects upon the fair and impartial administration of justice 13

Conclusion 16

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Abbate v. United States, 358 U. S. 187	9
Adams v. United States ex rel. McCann, 317 U. S. 269	4
Brock v. North Carolina, 344 U. S. 424	7
Buie v. United States, 76 F. 2d 848	12
Communist Party v. Subversive Activities Control Board, 351 U. S. 115	5
Costello v. United States, 350 U. S. 359	12
District of Columbia v. Buckley, 128 F. 2d 217	12
Dortch v. United States, 203 F. 2d 709	12
Gordon v. United States, 344 U. S. 414	5
Green v. United States, 356 U. S. 165	12
Jencks v. United States, 353 U. S. 657	5
Kercheval v. United States, 274 U. S. 220	7
McNabb v. United States, 318 U. S. 332	2
Mesarosh v. United States, 352 U. S. 1	5
Petite v. United States, 361 U. S. 529	8, 9
Pollard v United States, 352 U. S. 354	6
The Whiskey Cases, 99 U. S. 594	12
United States v. Bell, 163 U. S. 662	8
United States v. Fox, 130 Fed. 56	7, 12
United States v. Provoo, 17 F. R. D. 183, 350 U. S. 857	6
United States v. Rossi, 39 F. 2d 432	12
United States v. Sabella, 272 F. 2d 206	7

RULES

United States Code, Title 18, Federal Rules of Criminal Procedure, Rule 32(d)	4
United States Code, Title 18, Federal Rules of Criminal Procedure, Rule 11	4

TEXTS

Clark, On Criminal Procedure (2d Ed.; Mikell, 1918), p. 429	4

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Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is an organization dedicated to the preservation of the rights guaranteed by the Bill of Rights of the United States Constitution including the rights to a speedy trial and to the fair administration of justice. The decision of the Court below in the instant case appears to *amicus curiae* to have sanctioned a denial of both. Hence this brief is being filed, pursuant to Rule 42(1), with the consent of Petitioner and the Government.

Preliminary Statement.

Your *amicus* presents this brief out of a profound concern for the speedy, responsible and even-handed administration of justice. While public feeling runs strong against offenders such as Petitioner has admitted himself to be, that very fact calls for the most discriminating review of the procedures whereby his conviction was reached and his sentence meted out. The true test of the effectiveness of our "civilized standards of procedure" (*McNabb v. United States*, 318 U. S. 332, 340) lies in their scrupulous observance in the trials of those accused of heinous offenses or other conduct likely to evoke strong social condemnation. This is a case that calls upon the supervisory powers of this Court that both the reality and the appearance of justice may be maintained.

No separate statement of facts is here presented. Your *amicus* relies on Petitioner's statement of the case after having carefully read it and having become satisfied from an independent examination of the record that it is full and fair.

ARGUMENT.

I.

Petitioner Was Denied a Speedy Trial and for Reasons Which Are Themselves Subversive of the Fair Administration of Justice.

When his case was before Judge Clarke on June 26, 1958, Petitioner did what hundreds of criminals do every day in our federal courts. Having satisfied himself, with the advice of counsel, that he was guilty he determined to admit his guilt and obtain an early determination of his case so as to begin as quickly as possible the payment of his debt to society. To these ends his lawyer, as is done every day in our federal courts, worked out with the prosecutor a settlement of the litigation whereby the government obtained a conviction on two counts in return for dismissal of the remaining counts. This is a long recognized method of avoiding a trial of the obvious so as to save the resources of the courts and the law enforcement agencies for the trial of real issues. It expedites both the administration of justice in general and the completion of the particular case. It is probably the closest approach American courts have been able to make to the Anglo-Saxon objective of speedy justice in criminal cases. Its long use by private practitioners and prosecutors as well as its countenancing by the courts is the strongest possible recognition of its propriety and effectiveness.

If the accused in our system has any control over the kind of trial he is to receive, it is exercisable on the

question of pleading guilty or putting the government to its proof. Petitioner before Judge Clarke used his unquestioned right to enter a plea of guilty. As your *amicus* understands the law this right, voluntarily and intelligently exercised and not induced by fear or favor, is subject to no qualification.[1] So plain is this proposition that the Federal Rules of Criminal Procedure (Rule 32(d), 18 USC) would seem to recognize only one form of motion to withdraw such a plea, viz., a motion of the accused;[2] and the duty of the trial court to accept such a plea and forego trial is unquestioned. *Adams v. United States, ex rel. McCann*, 317 U. S. 269, 276; Clark's Criminal Procedure, (2d Ed.; Mikell, 1918) p. 429.

The plea having been entered the trial court's duty was to pass sentence. Rather on the government's motion, sentence was delayed. The purpose of this delay was to afford the prosecutor the means of exacting from Petitioner the testimony the government desired against a co-defendant. And this the trial court recognized and acceded to. [IR 11.] The delay of sentence, then, was a cat and mouse game in which the court, on the prosecutor's demand, agreed to hold imposition of sentence over Petitioner's head until the latter would have testified as the government expected him to. This

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[1]The Court's discretion under Criminal Rule 11 (18 U.S.C.) would seem to be limited to ascertaining that the plea was entered with full knowledge of the accused's legal rights and without coercion or improper inducement.

[2]This statement applies of course to pleas made advisedly, voluntarily and without unlawful inducement. We do not deal here with a plea tainted by coercion, fraud, corruption, ignorance of legal rights or constitutional protections, etc., and there is no need to speculate on the power of the court to vacate such a plea or the effects of vacating it.

would seem to be a gross tampering with the well-spring of truth, a demeaning misuse of judicial power. Whatever the circumstances[3] neither prosecutors nor judges should use their power to influence, in advance, a witness's testimony.[4] This Court has expressed grave concern over preserving the purity of the truth in judicial proceedings. *Mesarosh v. United States*, 352 U. S. 1; *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115. See also *Jencks v. United States*, 353 U. S. 657 (1957). This Court has not been unmindful of the fact that delay in the imposition of sentence may affect the credibility of a witness. *Gordon v. United States*, 344 U. S. 414, 422. The withholding of criticism of the trial court's methods there implies the necessity of it here because here the avowed purpose of delaying sentence was to influence or control testimony in the interests of the prosecution. The critical necessity that judicial administration be insulated from the taint of perjury imperatively demands that the courts themselves not countenance situations in which their sanctions so much as create the opportunity for shaping a witness's testimony.[4] Nor is the evil to be warded off simply that of calculated perjury. The prosecutor's recommendations as to sentence obviously carry weight with the court, and awareness of that fact among

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[3]Here the government was amply protected against any effort by Petitioner to pervert the truth. All of the transactions in which Petitioner was charged were "set up" by the government's undercover operative and his confidential informant.

[4]In this of course we exclude the court's power to try and in proper cases to punish individuals who have perjured themselves and to prevent obstruction of their processes. We emphasize here that it is the "prior restraint" quality of the threat that casts the shadow of impropriety.

convicted but unsentenced prisoners may be assumed. The desire to please or placate may lead only to subtle shadings in the prisoner-witness's story that will balance the scales in the government's favor. The fact is that the device here employed renders the prisoner-witness a prosecution pawn subject to influence generated by his very vulnerability if not by the zeal of law enforcement officials.

That there was delay, that it was purposeful and that its objective was to fashion a weapon of control or influence over what the prosecutor conceived his testimony should be is not open to doubt upon this record. The facts therefore fit the test laid down by this Court in *Pollard v. United States,* 352 U. S. 354, 361. The delay was "purposeful and oppressive;" it was not "accidental." It was done over Petitioner's most strenuous objection [IR 11], and he persisted in his demand to be tried on his guilty plea even before Judge Hall when the case came before him. [IR 34-A.] Here as in the *Provoo* case (*United States v. Provoo,* 17 F. R. D. 183, 198) where application of the Constitutional guaranty was approved by this Court (350 U. S. 857), the delay was "caused by the deliberate act of the government which the accused attempted to correct." *Pollard v. United States, supra,* at 362. But at bar not only has the government purposefully and oppressively caused delay but the trial court itself has participated.

II.

In the Trial Before Judge Hall Petitioner Was Subjected to Double Jeopardy.

A. When Petitioner appeared before Judge Clarke on June 26, 1958, and upon advice of counsel and with the approval of the court [IR 9, 10] entered pleas of guilty, jeopardy attached. This would seem manifestly true as to the two counts (one and two) to which such pleas were entered. See *Kercheval v. United States*, 274 U. S. 220, 223; *United States v. Sabella*, 2 Cir., 272 F. 2d 206; *United States v. Fox*, 3 Cir., 130 Fed. 56, 58. No occasion was presented before the trial court for rendering the pleas nugatory[5] and thus destroying Petitioner's exposure to jeopardy. (*Cf., e.g., Brock v. North Carolina*, 344 U. S. 424.) Rudimentary principles would therefore seem to forbid Petitioner's being forced to stand trial upon those counts.

B. The nature of the counts, to which the pleas were entered, broadens the double jeopardy protection to all acts embraced within count one. That count was a conspiracy count alleging three overt acts. [IR 4-5.] These overt acts were alleged as separate offenses in counts two, three and five. Thus surely as to all counts but count four Petitioner had before Judge Clarke, a trial on the merits.[6] Moreover as the record

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[5] *E.g.*, improper inducement, coercion, undue influence, lack of advice as to legal rights.

[6] Count four alleged an offense within the conspiracy period set out in count one and the omission of this transaction as an overt act in count one was probably inadvertent. We therefore treat this count *in pari materia* with counts two, three and five.

shows and as Petitioner argues in his brief the testimony to establish count one in its entirety was the same required to establish counts two, three and five.

The situation here, we submit, is indistinguishable, except in respects more favorable to Petitioner, from that in *Petite v. United States,* 361 U. S. 529 (1959). There the accused was indicted in two separate Districts for different offenses (conspiracy to make false statements in the Eastern District of Pennsylvania and subordination of perjury in the District of Maryland) growing out of testimony before an administrative agency. Following trial in the Pennsylvania District the accused was brought to trial in Maryland. His plea of double jeopardy was denied and after trial he was convicted. After certiorari had been granted the government moved this Court for an order vacating the judgment and remanding the cause to the trial court for dismissal of the indictment. This motion was bottomed upon the policy against more than one trial of several offenses growing out of the same transaction. The motion was granted.

Here, by pleading guilty to count one and the three overt acts there alleged Petitioner had his trial of the several offenses so charged. To require him to stand trial before Judge Hall on the same offenses put him in jeopardy on these offenses for the second time. He has been subjected to the very evil that the Constitutional protection was designed to forbid—the harassment of successive trials. *United States v. Bell,* 163 U. S.

662, 669; *Abbate v. United States,* 358 U. S. 187, esp. Brennan, J., separate opinion, at page 198.

There is one aspect of the case at bar which argues the more strongly for dismissal. In *Petite* the successive trials of the accused resulted solely from action by the prosecutors in the two Districts. But here, as will be developed at length immediately below, the initial disposition of the indictment was made by the trial judge who approved a settlement made by counsel. To subject Petitioner to another trial after a court approved settlement of the entire cause is to unsettle the conclusiveness of judicial action, to cast doubt upon the integrity of the judicial process. Under such circumstances no settlement of a criminal matter can be made with assurance.

C. Basic to the issues here presented is the effect of Petitioner's plea entered before Judge Clarke on June 26, 1958. [IR 9, 10.] It is submitted that in the understanding of court and counsel, reinforced by the long standing practice in federal (as well as state) criminal courts, there was submitted to and approved by the trial court an integrated settlement of the entire cause—all five counts of the indictment. This integrated settlement involved a plea of guilt as to two counts and a dismissal of the remaining counts. It is plain that Judge Clarke so understood and approved the pleas. Thus, as soon as the pleas had been entered the court said in response to Petitioner's expressed concern over "lost time" occasioned by delay in sentencing:

> "The Court: Would you like to have me make it five years on each Count and to run concurrently and waive time right now?" [IR 10.]

Then after acceding to the government's request for delay in sentencing so as to control Petitioner's testimony in the co-defendant's trial, the Court said:

> "The Court: I will keep my word with you at that time. It wil be five years on each Count, to run concurrently . . ." [IR 12.]

Thereupon the clerk called attention to the existence of counts three, four and five and the Court stated:

> "The Court: We are going to hold those, hold disposition until July 21st at 2:00 p.m." [IR 13.]

In this context, illuminated by practice well known to the entire bench and bar, the purpose and intent of the court, as well as of prosecution and defense, was unmistakably to have the defendant convicted on counts one and two and dismissed as to the balance. This as we have observed is an honorable and honored practice in the administration of criminal justice. It affords the accused a speedy trial. It serves the public interest in prompt justice, eliminating the congestion of the courts and bringing the confessed criminal the sooner to the insulation from society and the rehabilitating effects of our penology. To repudiate such a practice by giving a different judge power to undo it without cause is to invite abandonment of the means whereby an extremely large proportion of criminal cases is disposed of without the time and expense of trial. In its present

state it is to be doubted that the federal judiciary, without the advantage of the settlement procedure here invoked, is equipped to dispose of its case load within the Constitutional imperative of a speedy trial.[7]

By practice and tradition, if not by explicit statute or rule, the legal posture of Petitioner's case at the end of the proceedings on June 28, 1958, was that he had been exposed to jeopardy on all five counts and all five counts had been disposed of. There remained only the formal entry of a judgment the contents of which had already been announced. It was as if a jury had

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[7]Annually in the District Courts approximately 80% of the cases of accused defendants are disposed of by plea of guilty or *nolo contendere*. The statistics are as follows:

Year	Total Defendants	Defendants Convicted and Sentenced Upon Plea of Guilty or Nolo Contendere	Percent
1952	38,622	32,734	84.8
1953	37,762	31,336	83.0
1954	42,989	35,560	82.7
1955	38,990	31,148	79.9
1956	31,811	25,029	78.7
1957	29,725	23,867	80.3
1958	30,469	24,256	79.6
1959	30,729	24,793	80.6

Source: Annual Reports, Director of the Administrative Office of the United States Courts, for the fiscal years ending June 30 of the years indicated above. These reports are appended to the Annual Reports of the proceedings of the Judicial Conference of the United States for the years indicated (Government Printing Office).

On the importance of the settlement of criminal litigation by agreement for pleas of guilty in return for dismissal of other counts in an indictment or for pleas of guilty to lesser offenses, see Orfield, "Criminal Procedure from Arrest to Appeal" (1947), pages 297, 298.

returned a verdict of guilty on counts one and two and not guilty on counts three, four and five.

This is not the case of the prosecutor's unilateral *nol pros* as to one or all counts of an indictment. It is familiar law that such is not a final disposition of a criminal charge and no jeopardy attaches.[8] *Dortch v. United States*, 203 F. 2d 709 (1953); *Buie v. United States*, 76 F. 2d 848, 849 (1935); *United States v. Fox*, 130 F. 2d 56, 58 (1942). But these cases plainly rest on the fact that the prosecutor exercises his own discretion for his own reasons. Here the prosecutor and the defense counsel made an agreement, approved by the court itself, that a certain disposition of the case would be appropriate. It was on this basis that the pleas of Petitioner were received.[9] The integrity of the administration of justice demands that an agreement

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[8]It would seem that even in the case of the *nol pros* the proceeding in that indictment is *pro tanto* ended and a new indictment must be returned. *United States v. Rossi*, 9 Cir., 39 F. 2d 432, 433; *United States v. Fox, supra; Buie v. United States, supra.* No such indictment was found here. If the principle of the *nol pros* cases were to be followed here, Petitioner was denied his right to a grand jury accusation. See *Green v. United States*, 356 U. S. 165, 183; *Costello v. United States*, 350 U. S. 359, 361.

[9]It is this fact which distinguishes the case at bar from such cases as *The Whiskey Cases*, 99 U. S. 594, and *District of Columbia v. Buckley*, (C. A., D. C.) 128 F. 2d 217, and the casse there cited. In those situations the prosecutor and the defense made their own agreement outside of court. No action was taken in court with reference to these agreements and the court was not drawn in to an approval of them by accepting pleas as to part of the indictment and permitting dismissal of other parts. Those cases in short involved extra judicial agreement by the parties which one later sought to enforce judicially. Here the parties, having agreed to a complete settlement of the cause, submitted it for approval and obtained that approval. Judge Hall on July 29, 1958, set aside a judicial act, not the mere arrangements of counsel.

so made and so approved be kept. Absent such a rule the accused can be subjected to the same prejudice as was Petitioner here—deprivation of trial by plea, deprivation of speedy trial, delay of nearly two months in getting to trial and becoming caught in a cross fire of conflicting personalities and policies between two federal judges, with the final result that he must serve a sentence four times as long as if Judge Clarke had imposed his punishment.

In sum, on June 28, 1958, Petitioner was brought to trial upon the entire indictment and judicial disposition thereof was made to a point beyond the court's power to retrieve. Jeopardy attached as to the entire indictment, and Petitioner could not constitutionally be tried on that indictment, or the offenses charged therein, a second time.

III.

Petitioner Was Made the Victim of Capricious Action Before Judge Hall in an Incident That Reflects Upon the Fair and Impartial Administration of Justice.

The supervisory intervention of this Court is needed to redeem both the appearance and the reality of justice under law in this case. After acceptance and approval of the integrated settlement of Petitioner's case before Judge Clarke, the cause was transferred to Judge Hall, apparently upon his insistence, in connection with the scheduled trial of Petitioner's co-defendant. [IR 27.] Judge Hall, *sua sponte*, and absent anything of record to justify his action, vacated the pleas of guilty to counts one and two. [IR 30.] The reason given by Judge Hall for his unusual action was that "apparently it smacks too much of having the appearance of a bar-

gain . . . that if he would plead guilty, he would get five years." [IR 28.] The key word in this remark of course is "bargain." Judge Hall could not have referred to the agreement between counsel for as the bench and bar know perfectly well this is how settlements of litigation are arrived at. The word "bargain" refers to an agreement assertedly entered into by Judge Clarke "that if [defendant] would plead guilty, he would get five years." This is a wholly unwarranted charge of judicial misconduct which was made without support in the record and in the very teeth of counsel's assurance that "there was no bargain. This was done in open court." [IR 28.] That it was Judge Hall's assumption that Judge Clarke had participated in the improper "deal" was made crystal clear on his refusal to transfer Petitioner's matter back to Judge Clarke:[10]

> "The Court: And I can see no reason for transferring this back to Judge Clarke, because it would be merely in my opinion, confirmation of what appears to have all the earmarks of a deal.
>
> "In other words, the defendant is relying upon the fact that Judge Clarke said he was going to give him five years, so he has an understanding on his part that if, as, and when, because he pleads guilty, he is going to get five years, which might be another and different sentence than if he were tried and found guilty." [IR 34, 34-A.]

Thereafter, his pleas of guilty before Judge Clarke having been vacated, Petitioner offered to plead guilty

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[10]In the meantime the co-defendant had fled the jurisdiction and his trial could not go forward. [IR 22-25.] It was in connection only with that intended trial that the matter reached Judge Hall.

to counts one and two before Judge Hall. The latter refused to accept them, giving no reason.

Perhaps the reason underlying Judge Hall's remarkable conduct was his notion as to the aggravated nature of the offense. He twice referred to the fact that Petitioner's violations involved "15 ounces of heroin." [TR 28, 34-A.] If, indeed, that fact does point to aggravation it does not bear any relevance to the question of guilt or innocence. It is of course to be carefully weighed in fixing sentence. This truism only serves to point up the capriciousness of Judge Hall's act. His objection to the "deal" was not that Petitioner chose to be tried by plea rather than on issues of fact but rather that Petitioner would not be punished as Judge Hall thought he should have been.[11] Conduct of this sort reduces the administration of justice to a government of men, not of law. While personal differences in approach to problems of sentencing are, within limits, unavoidable in our system, judicial reaching, as in this case, to undo proper judicial action in order to effectuate a personal viewpoint distorts to the public, to the bar and to those accused of crime both the reality and the appearance of fairness under law.

The supervisory powers of this Court would be properly exercised here. Judge Hall's comments on Judge Clarke's conduct reflect upon the District Court and the administration of justice in that tribunal. His *sua sponte* vacating of Petitioner's guilty pleas and his later refusal to accept such pleas from Petitioner create the impression that in some circumstances at least the court

[11] At the conclusion of the trial before Judge Hall Petitioner's consecutive sentences totalled 20 years.

will knowingly ignore its legal limitations. And his apparent purpose to undo a conviction based upon plea and require a trial before a jury in order to afford an opportunity to impose sentence, as he personally saw fit interpolates too heavy a personal element in the dispensing of justice. Plainly these bizarre developments should be undone to restore public confidence in both the court and the individual judges concerned.

Conclusion.

For the reasons given this Court, in the exercise of its supervisory functions to see that fairness has been observed and public confidence maintained in the administration of criminal justice, should reverse the judgment below and remand this case for further proceedings in the District Court consistent with the settlement agreement approved by Judge Clarke.

Respectfully submitted,

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